

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

PRIMEFLIGHT AVIATION SERVICES, INC.

and

Case 29-CA-177992
29-CA-179767
29-CA-184505

SERVICE EMPLOYEES INTERNATIONAL
UNION LOCAL 32BJ

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for the General Counsel.

Frank Birchfield, Esq.,
Christopher R. Coxson, Esq.
(Ogletree Deakins, Nash, Smoak & Stewart, P.C.), of
New York, New York and Morristown, New Jersey),
for the Respondent.

Brent Garren, Esq. and
Tom Gottheil, Esq.,
for the Charging Party.

DECISION

Statement of the Case

MINDY E. LANDOW, Administrative Law Judge, Based upon charges filed by Service Employees International Union, Local 32BJ (Charging Party or Union) against PrimeFlight Aviation Services, Inc. (PrimeFlight, Respondent or the Employer) an order consolidating cases, amended consolidated complaint and notice of hearing (complaint) issued in the above-referenced matter. The complaint alleges that Respondent, a *Burns*,¹ successor, has refused to recognize and bargain with the Union in violation of Section 8(a)(1) and (5) of the Act and, as a result, has (1) failed to provide information that is necessary and relevant to collective bargaining; (2) unilaterally changed employees' terms and conditions of employment without providing the Union with notice and an opportunity to bargain by (a) deducting pay from employees' paychecks to account for unpaid break time and (b) by changing employee work schedules as discussed below.

The complaint further alleges that Respondent has violated Section 8(a)(1) of the Act by requiring its employees to sign, as a condition of employment, an unlawful arbitration agreement²

¹ See *NLRB v. Burns Security Services*, 406 U.S. 272 (1972).

² On February 10, 2017, Respondent filed a Motion to Partially Stay my ruling with regard to this paragraph and related allegations of the complaint. The basis for such a motion is that the Supreme
Continued

and that in June 2016, a supervisor of Respondent threatened employees with discharge because they engaged in activities in support of the Union.

Respondent filed an answer denying the material allegations of the complaint arguing that PrimeFlight is outside the jurisdiction of the National Labor Relations Board for unfair labor practice proceedings because it is a "derivative carrier" under the Railway Labor Act and moreover, that PrimeFlight is not a *Burns* successor because an analysis of PrimeFlight's full complement of employees demonstrates that predecessor employees comprise less than 40 percent of the appropriate unit.

The hearing in this matter was held before me on October 18, 19, and 20, 2016.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

Findings of Fact

Jurisdiction and Labor Organization Status

Commerce Facts

Respondent has admitted those aspects of the complaint which allege basic commerce jurisdiction. Thus, the record establishes, and I find that at all material times, Respondent has been a domestic corporation with its principal office and place of business located at 7135 Charlotte Pike, Suite 100, Nashville, Tennessee, and has places of business located at airports nationwide, including a place of business located at John F. Kennedy International Airport (JFK Airport) in Queens, New York. In the course and conduct of its business operations and has been engaged in the business of providing airport terminal services, including baggage handling, skycap services, checkpoint services, and wheelchair assistance to JetBlue Airways Corp. (JetBlue) at JFK Airport.

It is further admitted that based upon a projection of its operations since May 9, 2016, at which time Respondent commenced its operations at JFK Airport, Respondent will annually provide services valued in excess of \$50,000 for JetBlue, an entity which is directly engaged in commerce. It is also admitted, and I find that at all material times, the Charging Party has been a labor organization within the meaning of Section 2(5) of the Act.

The issue of whether Respondent is subject to the jurisdiction of the NLRB, thereby rendering it an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act is a preliminary question to consider and decide prior to a determination of whether PrimeFlight committed any of the unfair labor practices alleged in the complaint.

Court has granted certiorari for cases which raise, among other things, the issue of whether arbitration agreements which bar employees from pursuing work-related claims on a collective or class basis in any forum are violative of the Act. The Charging Party opposed this motion. However, the General Counsel has taken the position that it does not oppose Respondent's motion and, furthermore, has moved to have the relevant paragraphs of the complaint severed and a ruling on these allegations held in abeyance. Based upon the motion of the General Counsel, concurred with by the Respondent, I issued an order on February 28, 2017, ordering that the allegations relating to paragraph 10 of the complaint be severed and held in abeyance pending further decision of the Court or the Board. Accordingly, I will not discuss them further here.

The NLRB has Jurisdiction over PrimeFlight's Employees at Terminal 5 at JFK Airport

Background

JetBlue operates out of terminal 5 at JFK Airport. JetBlue offers certain services to its customers through independent contractors such as baggage handling, skycap, checkpoint, and wheelchair services. Prior to May 9, 2016, when PrimeFlight commenced providing services for JetBlue, an independent contractor known as Air Serv performed the baggage handling, skycap, and checkpoint services. Another contractor, PAX Assist, performed the wheelchair services.

On March 25, 2015, Air Serv and the Union entered into a recognition agreement which states that based upon a card check performed by an arbitrator, the Union "has demonstrated majority support among the full-time and regular part-time employees [excluding statutory exceptions]" employed by Air Serve at Newark Liberty, John F. Kennedy International, and LaGuardia Airports. The agreement does not specify which job titles are to be included in the bargaining unit.

In March 2016, PrimeFlight successfully bid on a contract with JetBlue under which it agreed to provide all four types of terminal services in the JFK terminal 5 beginning on May 9, 2016. This relationship was memorialized by two documents: a "General Terms Agreement" (GTO) and a "Statement of Work" (SOW). In particular, PrimeFlight agreed to provide wheelchair, line queue, baggage handling, and skycap services commencing on May 9. These matters will be discussed in further detail below.

Jurisdictional Analysis

Applicable Legal Standards

The protections of the Act extend to those workers who qualify as employees under Section 2(3) of the Act. The term "employee" as defined in the Act, does not include "any individual employed by an employer subject to the Railway Labor Act." Instead the Railway Labor Act (RLA) confers jurisdiction to the National Mediation Board (NMB) when that company is either a common carrier by air or rail as defined in the RLA, or that company is directly or indirectly owned or controlled by a rail or air carrier engaged in interstate or foreign commerce, referred to as a "derivative carrier."

Historically, when the National Labor Relations Board receives a petition or an unfair labor practice charge involving employees who work at an airline terminal or facility, and where a party contends that the NMB has jurisdiction, the NLRB will often request a ruling from the other agency before proceeding further. And, if the NMB decides that the employer is or is not subject to the Railway Labor Act, the NLRB will typically defer to such ruling. *DHL Worldwide Express*, 340 NLRB 1034 (2003). See also, *Primeflight Aviation Services*, 353 NLRB 467 (2008).³

³ In *Primeflight*, *supra*, the contractor performed skycap, wheelchair, baggage, priority parcel, ticket verification, and passenger services for various airlines at LaGuardia Airport. (That is, essentially the same type of services that PrimeFlight provides in this case). The Board requested the NMB to review the record in the representation case and that agency subsequently issued its opinion that the employer was subject to the Railway Labor Act. Considering the record in light of the NMB opinion, the Board dismissed the petition on the basis that the employer was subject to the Railway Labor Act.

Nevertheless, the NLRB is not required to refer a case to the NMB. In *Spartan Aviation Industries*, 337 NLRB 708 (2002), the Board stated:

5 When a party raises a claim of arguable jurisdiction under the RLA, the Board
generally refers the case to the National Mediation Board (NMB) for an advisory
opinion. However, there is no statutory requirement that the Board first submit a case
to the NMB for an opinion prior to determining whether to assert jurisdiction. *United*
10 *Parcel Service*, 318 NLRB 778, 780 (1995). Although the Board generally makes
such referrals, it will not refer a case that presents a jurisdictional claim in a factual
situation similar to one in which the NMB has previously declined jurisdiction. See,
e.g., *Phoenix Systems & Technologies, Inc.*, 321 NLRB 1166 (1996); *E.W. Wiggins*
Airways, Inc., 210 NLRB 996 (1974).

15 In determining whether the NLRB has jurisdiction, it has essentially adopted the same
jurisdictional test as the NMB. In recent cases, a majority of the NMB, has reiterated this test as set
forth in *Airway Cleaners LLC*, 41 NMB 262, 267–269 (2014) and *Air Serv Corp.*, 39 NMB 450, 459
(2012).

20 In *Air Serv*, the NMB discussed a two-part test. First, whether the nature of the work is that
which has been traditionally performed by employees of rail or air carriers. And second, whether the
employer is directly or indirectly owned or controlled by, or under common control with a carrier or
carriers. Both criteria must be met in order for the NMB to assert jurisdiction.

25 As to the second part of the test, the majority opinion of the NMB was that:

In applying the second part of its jurisdictional test, the Board looks for evidence of
whether a material degree of control exists between the carrier and the employer in
question for the latter to be deemed a carrier. Significant factors include: (1)
30 Whether the entity's employees are supervised by the carrier; (2) whether the
employees of the entity . . . act as the carriers' agents; (3) whether carrier officials
have the ability to make effective recommendations regarding the hiring and firing of
the entity's employees; (4) whether the entity . . . uses equipment owned by the
carrier to perform its duties; (5) whether the carrier has a significant degree of
35 control over the training of the entity's employees, and (6) whether the entity
performs work for more than one company and retains control over its operations.

There, based upon the foregoing standards, the NMB declined to assert jurisdiction
over a contractor that provided shuttle bus transportation services between airport parking
40 areas and terminal buildings.

In *Airway Cleaners*, supra at 267–269, the NMB, by majority vote, held that the employer, in
relation to its performance of services at LaGuardia Airport, which consisted of cleaning and
maintenance services, was not within its jurisdiction. The majority opinion stated, inter alia;

45 To determine whether there is carrier control over a company, the NMB looks at
several factors, including the extent of the carrier's control over the manner in which
the company conducts its business, access to the company's operations and records,
role in personnel decisions, degree of supervision of the company's employees,
50 whether employees are held out to the public as carrier employees, and control over
employee training.

As discussed in prior cases, where the Board has not found jurisdiction, a carrier must exercise “meaningful control over personnel decisions,” and not just the type of contract found in any contract for services . . . the contract provisions at issue here are similar to those in *Bags*. (*Bags Inc.*, 40 NMB 165, 170 (2013)). In that case carriers provided training to a *Bags*’ employee, who in turn trained other employees. The carriers provided equipment to *Bags*, had the right to bar employees from the airport if they did not comply with safety or other standards and reported employee misconduct to *Bags*. These examples of control were not sufficient to establish RLA jurisdiction.

In *Menzies Aviation Inc.*, 42 NMB 1 (2014), the NMB concluded that an employer that provided baggage, ramp, and aircraft servicing functions, mostly for Alaska Airlines at Seattle Airport, was not subject to the jurisdiction of the NMB. The majority opinion stated:

The evidence . . . demonstrates that carriers at SeaTac do not exercise a sufficient amount of control over *Menzies* . . . [The] contract describes a typical relationship between a carrier and a contractor. The fact that Alaska dictates standards for work performed is not unusual in a contract for services and does not evidence a significant degree of control over *Menzies*’ operations. All contracts specify certain standards that a company must follow in performing services for a carrier. For example, in *Bags, Inc.*, 40 NMB at 1666 –1667, the company had to follow the standard practice of Delta and Delta had the right to bar an employee from the airport if he or she did not comply with Delta’s appearance or safety standards. . . .

Likewise, the fact that Alaska auditors inspect work performance does not establish this type of control. A *Menzies* employee reported that Alaska managers may directly notify a *Menzies* employee of a small infraction but performance problems are reported to and all discipline is handled by *Menzies* management. The contract between *Menzies* and Alaska provides that *Menzies* “shall not be required by Alaska to terminate or discipline any of its own employees in breach of laws or (*Menzies*’s) employee disciplinary processes as set out in its employee handbook.” So while Alaska may report performance problems, *Menzies* determines the appropriate discipline following it’s own discipline process. . . .

Menzies further argues that Alaska’s authority to require it to remove from Alaska’s operations employees who it finds unacceptable, evidences the required control for RLA jurisdiction . . . *Menzies* is not required to terminate employees who are unacceptable to Alaska . . . The NMB has found jurisdiction based on the authority to remove employees where an employee has been terminated following a carrier request that he or she be removed from the contract. . . . That is not the case here; *Menzies* retains and exercises the option to utilize employees elsewhere at SeaTac.

While the Board has in the past found jurisdiction over *Menzies*’ operations at other locations, jurisdiction decisions are presented to the Board on a case-by-case basis at different locations where companies contract with direct carriers who exercise various degrees of control . . .

The extent to which the carrier controls the manner in which *Menzies* conducts its business is not greater than found in a typical subcontractor relationship. As in the Board’s recent *Airways Cleaners* decisions, Alaska does not exercise “meaningful control over personnel decision.” Alaska does not hire, fire or routinely discipline *Menzies* employees. Contract provisions even more explicitly leave these decisions

to Menzies. Menzies has its own discipline policy and, although Alaska managers can report misconduct or failure to follow procedures, Menzies has the authority to discipline as its managers see fit.

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In *Bags, Inc.* 40 NMB 165, 169 (2013), discussed in *Menzies*, supra, the NMB declined to assert jurisdiction over a contractor that provided skycap, wheelchair and unaccompanied minor services to airlines.

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Contentions of the Parties

The General Counsel maintains that foregoing cases represent a “shift” in the assertion of NMB jurisdiction in recent years, which ceded to the Board jurisdiction over airline contractors. In further support of this contention, the General Counsel cites to *Primeflight Aviation Services, Inc.*, Case 12-RC-113687 (2015) WL 3814049, slip op. at 1 fn. 1 (2015), where the Board denied the respondent’s Request for Review of the Regional Director’s determination that the Board had jurisdiction. In particular, Member Johnson acknowledged that “these cases represent a shift by the NMB from earlier opinions in which it had asserted jurisdiction on similar grounds, and this view is currently extant NMB law.”

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Having recognized that the NMB will decline jurisdiction over airline contractors, the Board now affirmatively takes the position that it will assert jurisdiction in such cases, absent evidence that an airline exercises greater control over the contractor than is present in a “typical subcontractor relationship.” *Allied Aviation Service Co.*, 362 NLRB No. 173, slip op. at 2 (2015). There, the Board asserted jurisdiction over contractor that provided fueling services to airlines, and granted summary judgment where the contractor refused to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

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PrimeFlight maintains that it is outside the jurisdiction of the National Labor Relations Board because it is a “derivative carrier” within the meaning of the Railway Labor Act. Specifically, Respondent maintains that PrimeFlight’s operations satisfy the “function” aspect of the test, because PrimeFlight’s employees perform work which has been traditionally performed by carrier employees. An examination of various NMB opinions shows that the services performed at terminal 5 fall within the scope of those services recognized as traditional airline craft and class functions.

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Respondent further argues that PrimeFlight’s JFK operations satisfy the “control” aspect of the derivative carrier test under the RLA. General Counsel and the Union dispute the foregoing contentions.

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Respondent contends that JetBlue has involvement in the hiring, firing, and disciplinary decisions of PrimeFlight employees. In support of the foregoing contentions, Respondent relies upon section 7.6 of the GTA which provides as follows:

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Business Partner [PrimeFlight] shall enforce (and, if applicable, cause its subcontractors to enforce) strict discipline and good order among its employees, to maintain and observe sound and harmonious labor practices, and to take all reasonable steps to avoid labor disputes (including but not limited to jurisdictional and other site specific labor disputes) and work stoppages. If, at any time any of the workers performing the Services shall be unable to work in harmony or shall interfere with any labor employed by JetBlue or any tenant of the area in which the Services are performed, Business Partner shall take reasonable steps as shall be

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necessary to resolve such dispute including but not limited to the removal and replacement of employees or agents.

5 In furtherance of the above noted contentions, Respondent further relies upon the testimony of Division Vice President Matthew Barry as follows:

Q: [by respondent's counsel]: With respect to JFK and JetBlue. If they ask you to remove an employee, what would your response be?

10 A: My understanding is, per our general terms agreement, contract with them, if they were to request it then I would have to abide.

15 Barry essentially reiterated such claims during his cross-examination and further stated that it was section 7.6 of the GTA, set forth above, that establishes such a requirement.⁴

20 Respondent further points to certain other obligations set forth in the GTA in support of its contention that PrimeFlight operates its business at JFK under the close control of JetBlue. In particular, Respondent notes that PrimeFlight's employees work entirely within a physical space controlled by JetBlue when performing their duties to support JetBlue's airline operations; PrimeFlight employees are trained on JetBlue training modules regarding the airline's policies and procedures including "Train the Trainer" training, initial curriculum training and backup processes should malfunctions occur. Additionally, JetBlue provides equipment used at JFK including wheelchairs, baggage carts, tablets, radios, computers, and telephones as well as internet service and other software or technology platforms as necessary. Skycap employees use JetBlue's computer system to check in customers, issue seat assignments, issue boarding passes, and process baggage fees.

30 In addition, JetBlue reserves the right to inspect and audit PrimeFlight's books, records, and manuals at "all reasonable times," in order for JetBlue to ensure compliance with the procedures and requirements of the GTA and the right to access records that it requires PrimeFlight to maintain such as electronic tracking of wheelchairs, tracking of customer wait times and complaints, the number of hours worked by PrimeFlight employees and certification of employee quarterly training.

40 PrimeFlight is also required to provide JetBlue with a daily shift report as well as daily, weekly, and monthly accountings of data pertaining to wheelchair services. PrimeFlight is required to maintain staffing levels to JetBlue's satisfaction. In particular, Article 9.1 of the GTA provides as follows:

45 The parties acknowledge that JetBlue's flight activity may increase or decrease over the duration of the Term, and that it will be the responsibility of PrimeFlight to maintain appropriate levels of personnel and equipment to perform the Services in strict accordance with this Agreement, regardless of any such activity.

50 JetBlue's SOW with PrimeFlight imposes requirements that employees be professionally dressed and neatly groomed. There are also rules regarding the handling of financial transactions and the issuance of documentation to passengers. There is a

⁴ At the time of the hearing, JetBlue had not made such a demand. Respondent notes that it had only been approximately 5 months since PrimeFlight commenced its operations.

prohibition against using personal cell phones or sleeping while on duty.

JetBlue also reviewed and approved the uniforms PrimeFlight issued to its employees.

General Counsel, endorsed by the Union, does not contest that Respondent meets the first prong of the “derivative carrier test,” but disputes that the evidence shows that JetBlue exercises substantial control over PrimeFlight in this instance.

At the hearing, Respondent stipulated that it has exclusive control over the hiring of its employees at JFK. With regard to promotions and demotions, Respondent stipulated that JetBlue does not provide recommendations with regard to PrimeFlight employees.

General Counsel argues that the issues of employee discipline and termination are controlled by PrimeFlight’s employee handbook, rather than any contractual provision with JetBlue, either through the GTA or the SOW. These rules include drug and alcohol abuse, sexual and other prohibited harassment, personal appearance, and workplace etiquette. PrimeFlight generally follows a progressive discipline policy in which counseling is followed by a written warning, then suspension and discharge for a fourth offense. In this regard, General Counsel and the Union argue that there is nothing in the GTA which requires PrimeFlight to terminate an employee, or gives JetBlue an unqualified right to make such a demand. In this regard, two provisions of the GTA are relied upon: Section 7.6 which has been set forth above, and a provision of the SOW which provides that JetBlue can demand the removal of a skycap found to be “collecting revenue outside of the system.”

General Counsel and the Union further contend that the record shows that PrimeFlight is exclusively responsible for the supervision and management of its employees, relying in significant part on Barry’s concession in this regard. In addition, the record demonstrates that PrimeFlight maintains a full supervisory structure. Moreover, section 9.1 of the GTA provides as follows:

Except as expressly set forth herein, Business Partner shall, at its sole cost and expense, furnish all labor, supervision, equipment, facilities, materials and supplies, and other requisites necessary for the proper performance of Services at each Airport.

[The remainder of section 9.1 has been set forth above].

It is argued that while JetBlue may provide feedback should it deem the level of staffing to be poor, PrimeFlight is responsible for assigning employees in the manner described above. In this regard, it assigns employees to their shifts and may change their schedules (which it, admittedly, has done).

General Counsel contends that Respondent conducts its business in the manner of a typical contractor. In support of these contentions, General Counsel relies upon Barry’s testimony that JetBlue compensates Respondent according to a per-flight flat rate and is responsible for all of its expenses. In addition, Barry testified that PrimeFlight supplies a complement of wheelchairs, tablets used by wheelchair agents and supervisors, computers and a software system known as Centrak.

PrimeFlight is largely responsible for the training of its employees. Section 10.9 of the GTA provides that:

Business Partner shall provide its employees, agents, representatives and subcontractors with all necessary initial and recurrent training, including familiarization with JetBlue Policies.

According to employees who testified at the hearing, it was PrimeFlight, not JetBlue that trained them. PrimeFlight's classroom training consists of several components. As Barry testified, PrimeFlight directs two: the "internal company training module" and "PrimeFlight technology application." The third module is "JetBlue policies, procedures and training," for which JetBlue provides training for PrimeFlight trainers, but does not directly train employees.

Both the General Counsel and the Union additionally point to the fact that PrimeFlight's employees are held out to the public as employees of PrimeFlight, not JetBlue. Employees wear uniforms bearing the PrimeFlight, not JetBlue, logo. Similarly, their identification badges demonstrate that they are employees of PrimeFlight. Respondent relies upon the fact that the uniforms were reviewed by JetBlue, but they were accepted with no changes.

Analysis and Conclusions

In the instant case, I find that the record does not support the Respondent's argument that the employees in question are indirectly controlled or under common control with a carrier or carriers to an extent sufficient to invoke the jurisdiction of the NMB under the Railway Labor Act.

As the National Labor Relations Board has found:

In recent cases assessing whether it has jurisdiction over employers who supply services to an airline carrier or carriers but are not themselves engaged in the transportation of freight or passengers, the NMB has focusused on whether the carrier or carriers exercise "meaningful control over personnel decisions. See, e.g. *Airway Cleaners LLC*, 41 NMB 262, 268 (2014) (control exercised is "not the meaningful control over personnel decision[s] required to establish RLA jurisdiction"); see also *Menzies Aviation, Inc.* 42 NMB 1, 7 (2014) (no jurisdiction where carrier "does not exercise 'meaningful control over personnel decisions'" (quoting *Airway Cleaners*)); *Bags, Inc.*, 40 NMB 165, 170 (2013) (carrier control "is not the type of meaningful control over personnel decisions [sufficient] to warrant RLA jurisdiction"). Where it is not found such meaningful control, the NMB has emphasized in particular the absence of control over hiring, firing, and/or discipline) See *Menzies Aviation*, 42 NMB at 7; *Airway Cleaners*, 41 NMB at 269 and *Bags, Inc.*, 40 NMB at 170.

Allied Aviation Service Co. of New Jersey, 362 NLRB No. 173, slip op at 1 (2015).

Here, I find the facts and extrapolated arguments advanced by the Respondent to be unavailing. These include, in particular, the fact that PrimeFlight uses space provided by JetBlue in terminal 5; the fact that PrimeFlight designs employee schedules and hours based upon the flight schedule provided by Jetblue; the tracking of the workforce to ensure sufficient staffing; the fact that the SOW imposes standards of conduct to which PrimeFlight employees must adhere and the right to inspect PrimeFlight's books and records and to request other records as necessary. See, e.g., *Bags*, supra at 166–168.

With respect to discipline and termination, PrimeFlight's agreement with JetBlue does not provide the carrier with a unilateral right of removal, and there is no evidence to support any contention that this is the case. Rather, the relevant documents provide that if a skycap is found to be collecting revenue outside the system, JetBlue will request that the employee be removed from baggage checking services. However, there is no requirement that an employee be terminated; rather it appears that PrimeFlight retains the discretion to reassign the employee in question, as the GTA only provides for removal from baggage checking. Similarly, with regard to that provision which calls for PrimeFlight to discipline employees up to and including termination, if the employee causes work stoppages or interferes with JetBlue's ability to provide services, the ultimate disciplinary decision is left to the discretion of Respondent. With respect to hiring, the record shows that PrimeFlight has control over personnel decisions including the interviewing and decision as to whether to hire employees. PrimeFlight sets the rate of pay, benefits, disciplinary procedures and other work requirements for its employees. The record evidence regarding the nature and extent of PrimeFlight's interactions with JetBlue supervisory and managerial personnel fails to establish that JetBlue has authority to direct the work of PrimeFlight employees. While JetBlue provides PrimeFlight with certain equipment for employee use, the extent to which it does so is not determinative. See *Bags*, supra at 167. The training requirements are largely determined by PrimeFlight, and the fact that they may include certain aspects of the JetBlue curriculum, safety concerns, new programs and special events is similarly nondeterminative. Finally, the record is clear that PrimeFlight employees are intended to be, and are, held out to the public to be employees of that company and not of JetBlue.

Here, based upon the record as set forth above and considering the respective arguments of the parties in that context, I conclude that the elements of control are no greater than those found in a typical subcontractor relationship. PrimeFlight is required to furnish, at its own cost, labor, supervision, equipment, materials and supplies. It is responsible for the hiring, training and discipline of its employees. The extent to which JetBlue exercises control over PrimeFlight operations consists of generalized, broad constraints which relate to standards of performance. In parallel factual situations applying to airline contractors similar to Respondent, the NMB has repeatedly declined jurisdiction. See *Menzies Aviation*, *Airway Cleaners*, *Bags, Inc.*, and *AirServ. Corp.*, all discussed above. Moreover as further noted above, given similar factual circumstances, the Board has asserted jurisdiction over this Respondent in another location, acknowledging the "shift" in the NMB's position on such matters in recent years.⁵

Accordingly, I find that the National Labor Relations Board properly has jurisdiction over the PrimeFlight operations at terminal 5 at JFK.

The Alleged Unfair Labor Practices

The Successorship Issue

In the weeks leading up to the May 9, 2016 transition date, PrimeFlight hired its work force, with the intention of ensuring no gap in services once it assumed operations. To that end, PrimeFlight asked Air Serv to provide it with lists of active employees. In

⁵ In this regard, I find the earlier decision in *PrimeFlight Aviation Services*, 353 NLRB 467 (2008), discussed above, not to be controlling here due to the different factual contexts and the above-mentioned "shift" in jurisdictional analysis.

addition, Air Serv coordinated and communicated with PrimeFlight regarding those employees who would be offered the opportunity to apply for employment with the new contractor.

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Between April 5 and May 7, 2016, Respondent hired 367 employees that it would employ on its first day of operation, May 9. There is no evidence that JetBlue had any input into these hiring decisions. Between May 7 and June 6, no additional employees were hired by PrimeFlight. Of these initial hires, as the General Counsel has conceded, 16 are excluded from the unit as they have been deemed statutory supervisors. Thus, throughout the entire first month of operations, the alleged bargaining unit consisted of 351 employees in the non-supervisory job categories: baggage handling, skycap services, line queue and wheelchair services. Of this number, 183 had previously worked for Air Serv.⁶

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During the first month of operations, until June 6, the asserted bargaining unit consisted of 351 employees in the four job categories described above: baggage handling, skycap services, line queue and wheelchair services. Of this number of employees, 183 had previously worked for Air Serv.

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Hiring resumed on June 6, but up until that time, as set forth above, over 50 percent of Air Serv's former statutory employees about whom there is no dispute had been employed by PrimeFlight. During this interim period, no additional job classifications were added, and there is no evidence that any were subsequently introduced.

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The record also establishes that since beginning operations on May 9, Respondent has, to some extent, utilized its work force interchangeably among job classifications. For example, baggage employee Denzyl Williams testified that he has performed wheelchair duties upon request, and has observed wheelchair employees performing baggage work. Similarly, wheelchair employee Omar Duhaney testified that, in addition to his wheelchair duties, he has also performed baggage duties on several occasions on a weekly basis. He has also observed baggage employees and line queue employees performing wheelchair duties.

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The Union's Demand for Recognition, Bargaining and Information

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On May 23, 2016, counsel for the Union sent the following letter to the general counsel of Respondent stating, in relevant part:

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Primeflight Aviation Services is the successor employer for two bargaining units represented by SEIU Local 32BJ. As such, PrimeFlight is legally obligated to recognize the union as the exclusive collective bargaining agent, bargain with us concerning terms and conditions of employment and to provide information necessary and relevant to collective bargaining. The two units are:

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⁶ These statistics are culled from various exhibits entered into evidence during the hearing including: (1) the list provided by Respondent to the General Counsel of employees that it had hired who had formerly worked for Air Serv, entered by stipulation of the parties; (2) the lists of new hires as of May 9 and June 16, 2016, introduced by Respondent; (3) payroll records provided by Respondent to the General Counsel, as stipulated into evidence and (4) a different hire list provided by Respondent to the General Counsel during the investigative stage of the proceeding. Having reviewed these exhibits, I find that they support the numerical calculations of the General Counsel in this regard.

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5 PrimeFlight's employees at JFK Airport, the majority of whom were formerly
Air Serv employees represented by Local 32BJ. These are employees
working at Terminal 5 on the Jet Blue account, providing baggage handling,
skycap and check point services. As we understand it, the appropriate
bargaining unit also includes employees providing wheelchair assistance.
10 We request recognition for a unit of all full-time and regular part-time
employees at Terminal 5 on the Jet Blue account, excluding supervisors
office clericals, and guards as defined in the NLRA.

[The Union's second demand, for a unit of employees at Newark Liberty
Airport is excluded here, as this unit is not at issue in these proceedings.]

15 Please provide dates on which you are available to bargain.

Please provide us with the following information necessary and relevant to
collective bargaining:

20 A roster of all bargaining unit employees, including their names, addresses,
telephone numbers, e-mail addresses, wages, shifts, classifications and start dates.

A copy of any employee handbook applicable to any bargaining unit employee.

25 A copy of the summary plan description for any health insurance or other employee
benefit plan applicable to any bargaining unit employee.

Please provide this information in one week from receipt of this letter.

30 Finally, please be aware that prior to any change in the employees' terms and
conditions of employment, you are required to provide notice and an opportunity to
bargain to the Union. Failure to do so would be a violation of the National Labor
Relations Act.

35 By letter dated May 25, 2016, Respondent's Senior Vice President of Human
Resources William Stejskal III replied to the Union as follows:

40 In your letter to General Counsel, PrimeFlight Aviation Services dated May 23,
2016, it asserted tht Local 32BJ represents certain AirServ employees at JFK
Airport and Newark Liberty Airport who are now employed by PrimeFlight. Please
promptly provide me evidence that establishes the basis for this assertion, including
the Board Certification(s) and Collective Bargaining Agreements(s).

45 On June 2, 2016 the Union replied as follows:

In reply to your letter of May 25, please find enclosed a copy of the Recognition
Agreement between Air Serv Corportion and SEIU Local 32BJ, dated March 26,
2015, for a bargaining unit that encompassed the employees at issue at both JFK
and Newark Airports.

50 By letter dated June 10, 2016, Stejskal requested that the Union provide any
additional agreement between the parties, "that preceded the Recognition Agreement and
stipulated the card check procedure referenced in the Recognition Agreement," should one

exist. Additionally, Stejskal asked Union counsel whether a collective bargaining agreement exists for any of the employees at issue, and explained that its requests are relevant to the Union's May 23 demand.

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By letter dated June 15, 2016, the Union replied by stating, "We have supplied you with sufficient documentation to demonstrate that we represent the employees at JFK and Newark airport in which the former Air Serv employees constitute a majority of Respondent's nonsupervisory work force. After you acknowledge that the Union is the exclusive bargaining agent, we will be happy to provide any additional information which is necessary and relevant to collective bargaining. Please provide the authority that supports your claim that a collective-bargaining agreement or documents preceding the recognition agreement are necessary to determine our representative status."

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Subsequent to this exchange of correspondence, the record reflects no further communication between the parties.

Subsequent Hiring of Wheelchair Staff

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Three days after the Union's May 23 demand for recognition, Respondent commenced hiring additional employees. The majority of the new hires were wheelchair service employees. By June 16, Respondent had hired 441 employees in total. Whereas more than half of its employees had been former Air Serv employees when the Union demanded recognition on May 23, as of June 16, fewer than half of Respondent's employees were former Air Serv employees. By the time Respondent had concluded hiring, on July 6, it had hired 507 employees. As a result of this hiring, former Air Serv employees comprised approximately 39 percent of the total number of employees.

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PrimeFlight has contended that upon assuming operations on May 9, 2016, it determined that it needed 500 employees. In support of these contentions, Respondent relies primarily upon the testimony of Barry who stated that PrimeFlight came to understand that its initial staffing level was insufficient to "manage the volume of requests that [PrimeFlight] would be receiving in particular in the wheelchair operation."

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Barry further asserted that the staffing problem was compounded by the fact that JetBlue had failed to properly communicate the work that PrimeFlight would be responsible for handling, including those who work with TSA in moving baggage being scanned. Thus, PrimeFlight estimated a need to hire an additional 250 employees, and targeted about 500 employees to be hired in two phases: the first in early June and the second in late June and early July.

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A memorandum dated May 12, 2016, from a JetBlue representative to PrimeFlight managers states as follows:

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261 Badges sound promising⁷

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⁷ According to an earlier email sent from PrimeFlight representative Debra Gray to JetBlue representative Christopher Kemmerer, the 261 badges referred to the clearing of identification badges. Gray also stated in this email that PrimeFlight agents were "working significant amounts of overtime to try and support the operation. We have formulated teams of leads and supervisors to ensure as much gate coverage as possible while concentrating for preplanning for heavy flights, staging wheelchairs for large groups and watching the International flight arrivals."

This evening . . . we had 6 JetBlue Customer Service supervisors plus a duty manager pushing wheelchairs through our Customer hall

5 For leadership's awareness, we would like to see a shift breakdown of staffing by each position at the beginning of the AM and PM shift starting tomorrow through the weekend.

10 We are prepared to supplement your staffing at certain positions so that you can throw that manpower into the wheelchair operation.

On May 18, 2016, Vice President Barry sent the following email to various PrimeFlight managers:

15 Need to divide task of priority within team.

Next 10 days focus

1. Safety (who's giving daily safety briefings)
2. Schedules
3. Badging status of every employee
- 20 4. Payroll
5. Tip-sheets
6. Recruiting/training heavily (authorized to add another admin position full time if needed)

25 If we focus on doing these 6 things well in the next 10 days, we will see positive results.

30 Respondent relies upon Barry's explanatory testimony that he sent the email because of PrimeFlight's "concerns about not having enough staff to support the operation."

Analysis of the Successorship Issue

35 In *NLRB v. Burns International Security Services*, 406 U.S. 272, 287 (1972), the Supreme Court held that if a new employer "voluntarily [takes] over a bargaining unit" of its predecessor, then the successor employer is under a duty to bargain that represented the predecessor's employees." Under *Burns*, the obligation to recognize and bargain with an incumbent union exists when there is a (i) "substantial continuity" between the predecessor and successor enterprises, and (ii) when a majority of the employees of the successor, in an appropriate unit, had been formerly employed by the predecessor. *Burns*, 406 U.S. at 280–291. Subsequently, the Court further held that the determination of successorship is "primarily factual in nature and is based upon the totality of the of the circumstances in a given situation." *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987).

45 The Supreme Court has made it clear that successorship status under and its progeny is predicated upon an employer's choice to hire more than 50 percent of its work force from its predecessor's work force. See *Fall River*, supra at 41 (explaining that the successorship doctrine is based upon a "conscious decision" of the new employer "to maintain generally the same business and to hire a majority of its employees from the predecessor" and "[t]hat this makes sense when one considers that the employer intends to take advantage of the trained work force of its predecessor"). In the instant case, I conclude that PrimeFlight is a *Burns* successor because the record demonstrates that (i)

PrimeFlight substantially continued Air Serv's operations in terminal 5 and (ii) as of May 23, 2016, the date the Union demanded recognition, a majority of the employees that PrimeFlight hired were former employees of Air Serv in an appropriate bargaining unit.

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Substantial Continuity

The "substantial continuity" inquiry involves the assessment of several factors:

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whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers.

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Fall River, 482 U.S. at 43.

Here, the record evidence shows that the retained employees' perspective was that their jobs remained essentially unaltered. PrimeFlight operated Air Serv's operations in baggage handling, skycap and checkpoint services in basically unchanged form.

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The transition between the two companies was overnight, with Air Serv concluding its operations on May 8 and PrimeFlight commencing operations without interruption on May 9. As of May 9, the PrimeFlight employees in baggage handling, skycap, and checkpoint services were over 90 percent the same as those previously employed in these same classifications with Air Serv.

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In this regard, I note that in its answer to the complaint, Respondent has admitted that since about May 9, 2016, Respondent has continued to operate the portion of Air Serv's business at JFK Airport in basically unchanged form.

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I find that PrimeFlight's changes, such as altering uniforms and identification materials are minor. More telling is the fact that employees were performing the same work that they did for Air Serv, in the same location, with substantially the same supervision and with no interruption in service. Although PrimeFlight added another classification of customer service, wheelchair assistance, formerly provided by PAX Assist, that does not materially change the instant analysis. The employees' perceptions of their jobs (as described above) and their jobs themselves (as admitted) have not changed. The record demonstrates that employees viewed their jobs as being essentially unaltered, and that the new employer, PrimeFlight, intended for it to be that way, as well.

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Based upon the foregoing, I find that there has been substantial continuity of operations to meet the test for successorship here.

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Majority Status

Once the substantial continuity test has been satisfied, a successor's bargaining obligation requires that a majority of the employees of the successor, in an appropriate unit, were formerly employed by the predecessor. Here, the record shows that of May 23, 2016, when SEIU made its demand for recognition, over 50 percent of PrimeFlight's employees had previously been employed by Air Serv and were represented by SEIU Local 32BJ.

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Respondent's defense is that on May 23 it had not yet finished hiring, and planned to do so in the near future. Relying on *Fall River*, supra at 47, Respondent argues that its bargaining obligation is triggered only if a "substantial and representative complement" existed at the time.

The Board and the courts have acknowledged that in determining whether a representative complement exists, there may be a startup period during which a new employer may gradually build its operations and hire employees. In determining the time when a "representative complement" exists and thus a bargaining obligation will attach, the Board considers various factors: whether the employer has substantially filed the unit job classifications designed for the operation, whether the operation was in substantially normal production, the size of the complement on the date of normal production, the time expected to elapse before a substantially larger complement would be at work and the relative certainty of the expected expansion. *Fall River*, supra at 49.

As may be obvious, this analysis turns on the facts of the case. In *Fall River*, the Court found the employer to be a *Burns* successor because it "had hired employees in virtually all job classifications, and hired at least fifty percent of those it would ultimately employ in the majority of those classifications, and it employed a majority of the employees it would eventually employ when it reached full complement." Id at 52. Here, as of the date that the Union demanded recognition (May 23), PrimeFlight had hired employees into all four job classifications; it had hired at least 50 percent in a majority of the classifications, in fact hiring over 90 percent of the employees in three out of four job classifications.

Respondent's argument, supported primarily through the testimony of Barry, that upon commencing operations PrimeFlight had determined a need to hire additional employees in total of an excess of 500 employees is unsupported in the factual record. Barry's testimony is conclusionary and vague. There is no document in evidence or evidence of other communications among PrimeFlight principals to show that this was an eventual goal undertaken at the outset of operations. The hiring of additional employees did not commence until after the Union's initial demand for recognition and bargaining, and there is no convincing evidence that it contemplated doing so prior to that date. In this regard I note that while Barry's May 18 memorandum to employees enumerates a list of priorities, there is only one item which refers to "recruiting/training" and makes specific reference only to adding another administrative position if needed. Similarly, the email issued by Gray referred to employee overtime and formulating terms of leads and supervisors; but fails to address the issue of hiring additional employees. Such evidence is insufficient to show that Respondent expected to and had concrete plans to hire significant numbers of unit employees prior to, at the time or shortly after it assumed the contract at terminal 5.

The record demonstrates that Respondent was in full operation as of May 9. From the initial date of operation, PrimeFlight contracted with JetBlue to provide four types of services in terminal Five for JetBlue, and did so for two weeks until the Union's demand for recognition, with no gap in operation and no substantive evidence that it intended to significantly expand its operation in any manner.

Appropriate Unit

Majority status is found as of the date upon which a union demands recognition, as long as a representative complement exists. Once majority status is found, a successor's bargaining obligation requires that the unit remain appropriate for collective bargaining

under the successor's operations. In this regard, the Board has long found a single-facility unit to be presumptively appropriate and the party opposing it has a heavy burden to rebut such a presumption. See e.g. *Trane*, 339 NLRB 866 (2003); *Budget Rent A Car Systems*, 337 NLRB 84 (2002). Moreover, as noted above, at the hearing employees testified about interchange among job classifications. In analyzing a successor's duty to bargain, the Board has found units which include previously unrepresented employees to be appropriate, as long as a majority of the entire unit is comprised of predecessor employees. *Good N' Fresh Foods*, 287 NLRB 1231, 1236–1237 (1988)(finding that successor was obliged to bargain with union in unit comprised of formerly unrepresented maintenance employees and represented production employees). There is no evidence rebutting the presumption that a single "wall-to-wall" unit would be appropriate here.

Accordingly, I conclude that as of the date of the Union's demand for recognition, May 23, 2016, Respondent employed a substantial and representative complement of its workforce in an appropriate bargaining unit, and Respondent failed to adduce sufficient evidence to rebut that presumption.

Thus, PrimeFlight was thereby obliged to meet and bargain with the Union as the exclusive collective-bargaining representative of its employees.

The Refusal to Bargain, Provide Information and Unilateral Changes in Terms and Conditions of Employment

Refusal to Provide Information

Under Section 8(a)(5) of the Act, an employer is required to provide a union with relevant information necessary to perform its duties as collective-bargaining representative. *NLRB v. Acme Industries Co.*, 385 U.S. 432, 435 (1967); *NLRB v. Truitt Mfg. Co.* 351 U.S. 149, 152 (1956). When a union's request for information pertains to employees within the bargaining unit, such information is presumptively relevant and the employer is obliged to provide it. *Disneyland Park*, 350 NLRB 1256, 1257 (2007).

In the instant case, the requests made by the Union in its May 23 letter pertain directly to bargaining unit employees: (1) roster of bargaining unit employees; (2) employee handbook(s) applicable to any bargaining unit employee and (3) summary plan description(s) for any health insurance or other benefit plan applicable to any bargaining unit employee. These requests are therefore presumptively relevant. Respondent does not dispute that it failed to provide such information, and there is no evidence that it did so in a timely fashion, or at all. Thus, inasmuch as Respondent had a bargaining obligation with the Union under *Burns* and its progeny, Respondent was obliged to provide such information and its failure to do so is a violation of Section 8(a)(5) and (1) of the Act.

Unilateral Changes

Section 8(a)(5) further prohibits an employer from unilaterally changing, without providing to a union notice and an opportunity to bargain, mandatory subjects of bargaining. *NLRB v. Katz*, 369 NLRB 736, 747 (1962). A change to employee paid break time is a mandatory subject because it involves "rates of pay, wages, hours of employment, or other conditions of employment." See, e.g., *Litton Systems*, 300 NLRB 324 (1990) (employer violated Section 8(a)(5) by eliminating extra paid half hour for lunch the day prior to Christmas); *Xidex Corp.*, 297 NLRB 110 (1989)(employer violated Section 8(a)(5) by replacing 30 minute unpaid break with 15 minute break). As it has been shown that

Respondent was a successor under *Burns* and its progeny beginning as of May 23, Respondent was under an obligation to provide notice and an opportunity to bargain over changes to employee paid break time.

Respondent has admitted that since August 26, 2016, it has deducted pay from employee paychecks for unpaid break time, and the record establishes that it did so without prior notice to the Union or affording the Union an opportunity to bargain with respect to this conduct and the effects of such unilateral changes.⁸ Inasmuch as Respondent, as a *Burns* successor, was not privileged to implement such unilateral changes and by doing so, Respondent violated Section 8(a)(5) and (1) of the Act.

As noted above, Section 8(a)(5) of the Act prohibits an employer from changing mandatory subjects of bargaining without notice and bargaining. Board law has made clear that employee schedules and workhours are mandatory subjects of bargaining with may not be unilaterally changed. *Katz*, supra at 747; *Palm Beach Metro Transportation, LLC*, 357 NLRB 180 (2011)(reduction of workhours in response to fluctuations in available work); *Illiana Transit Warehouse Corp.*, 323 NLRB 111 (reduction of hours); *Dickerson-Chapman, Inc.*, 313 NLRB 907 (1994)(same). The “particular hours of the day and the particular days of the week during which employees shall be required to work are well within the realms of wages, hours and other terms and conditions of employment’ about which employers and unions must bargain.” *Milwrights, Conveyors and Machinery Erectors Local No. 1301*, 321 NLRB 30, 31 (1996).

Here, Respondent has admitted that since about September 12, 2016, it has made changes to employee work schedules which included changing scheduled work days and reducing workhours. Respondent has also admitted that it made such changes with prior notice to the Union and without affording the Union the opportunity to bargain with respect to this conduct and its effects. Accordingly, based upon my conclusion that Respondent is a *Burns* successor, I find that by doing so, Respondent has violated Section 8(a)(5) and (1) of the Act.

The Threat of Discharge

Employee Omar Duhaney testified that in June, admitted supervisor and agent Erick Brazao-Martinez told Duhaney and other employees (as Duhaney recounted), “Don’t join the Union. We’ve only been with PrimeFlight for a couple of months. Be smart guys. If you join the Union you will get fired.” No witness was presented to rebut this testimony, and based upon this factor, coupled with the demeanor of the witness and the clear and unambiguous nature of his testimony, I credit it.

Threatening employees with discharge because of their union or concerted, protected conduct is a classic violation of Section 8(a)(1) of the Act. *Pressroom Cleaners*, 361 NLRB No. 57 (2014) (supervisor’s statement that employees would be fired if they continued to talk to a union representative was a “classic and blatant” violation of Section 8(a)(1)); See also *Pioneer Hotel & Gambling Hall, Inc.*, 276 NLRB 694, 698 (1985).

⁸ There is un rebutted testimony to the effect that employees had previously been asked to sign a form acknowledging that 30 minutes per day will be deducted from their pay to account for break time. This had not previously been done and no policy to such effect had previously been enforced. See *Flambeau Airmold Corp.*, 334 NLRB 165 (2001) (enforcement of previously unenforced rule constituted unilateral change).

Based upon the foregoing, I find that by threatening employees with discharge should they join the Union, Respondent, by its admitted supervisor and agent, violated Section 8(a)(1) of the Act.

Conclusions of Law

1. PrimeFlight Aviation Services, Inc. (PrimeFlight, Employer or Respondent) is an employer engaged in commerce within the meaning of Section 2(6) and 2(7) of the Act.
2. Service Employees International Union, Local 32BJ (Union) is a labor organization within the meaning of Section 2(5) of the Act.
3. The following unit constitutes an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.
 All full-time and regular part-time employees employed by Respondent at JFK Airport excluding confidential employees, office clericals, guards and supervisors as defined by the Act.
4. Since May 23, 2016, and at all times material thereafter the Union has been, and is now, the exclusive collective bargaining of Respondent's employees in the above-described unit within the meaning of Section 9(b) of the Act.
5. PrimeFlight has engaged in conduct in violation of Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of its employees in the unit.
6. By refusing to provide the following information to the Union on and after May 23, 2016, Respondent has engaged in conduct in violation of Section 8(a)(5) and (1) of the Act:
 A roster of all bargaining unit employees, including their names, addresses, telephone numbers, e-mail addresses, wages, shifts, classifications and start dates;
 A copy of any employee handbook applicable to any bargaining unit employee;
 A copy of the summary plan description for any health insurance or other employee benefit plan applicable to any bargaining unit employee.
7. By making the following changes in terms and conditions of employment without affording the Union notice and an opportunity to bargain over such changes, Respondent has engaged in conduct in violation of Section 8(a)(5) and (1) of the Act:
 Since about August 26, 2016, deducting pay from employee's paychecks to account for unpaid break time;
 Since about September 12, 2016, changing employee work schedules including work days and reducing hours;
8. In or about June 2016, Respondent by supervisor and agent Eric Brazao, violated Section 8(a)(1) of the Act by threatening employees with discharge because they engaged in conduct in support of the Union.
9. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. As I have found that Respondent has unlawfully failed and refused to recognize and bargain with the Union, I shall recommend that Respondent recognize the Union as the exclusive collective-bargaining representative of its employees in the above-described unit and, upon request, meet and bargain in good faith concerning wages, hours, benefits and other terms and conditions of employment, and if an agreement is reached reduce the agreement to a signed written contract. Respondent also shall be ordered to provide to the Union the information requested in its May 23, 2016 letter. Additionally, the Respondent shall, on request of the Union, rescind any departure from terms and conditions of employment that existed before the Respondent's takeover of operations at JFK Airport and retroactively restore preexisting terms and conditions of employment including work schedules and compensation for break time that would have been paid, absent the Respondent's unlawful conduct, until the Respondent negotiates in good faith with the Union to agreement or to impasse. Backpay shall be computed as in *Ogle Protection Service*, 183 NLRB 602 (1970) enfd. 444 F.3d 502 (6th Cir. 1971), plus interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁹

ORDER

The Respondent, PrimeFlight Aviation Services, Inc., Queens, New York, its officers, agents, successors and assigns shall

1. Cease and desist from

- (a) Failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of its employees in the following unit:
All full-time and regular part-time employees employed by Respondent at JFK Airport excluding confidential employees, office clericals, guards and supervisors as defined by the Act.
- (b) Refusing to provide the following information to the Union:
A roster of all bargaining unit employees, including their names, addresses, telephone numbers, addresses, wages, shifts, classifications and start dates; a copy of any employee handbook applicable to any bargaining unit employee; a copy of the summary plan description for any health insurance or other employee benefit plan applicable to any bargaining unit employee.
- (c) Making changes in terms and conditions of employment without affording the Union notice and an opportunity to bargain over such changes.
- (d) Threatening employees with discharge because they engage in conduct in support of the Union.

⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

- (e) In any like or related manner interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

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2. Take the following affirmative action necessary to effectuate the policies of the Act:

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- (a) On request, meet and bargain with the Union as collective-bargaining representative of its employees in the described appropriate bargaining unit concerning terms and conditions of employment and, if agreement is reached, embody the agreement in a signed collective-bargaining agreement.

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- (b) Provide the information to the Union requested in its May 23, 2016 letter.
(c) Upon request, rescind the unilateral changes made to employee terms and conditions since May 23, 2016 and make whole employees for the effects of such changes as described in the remedy portion of this decision.

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- (d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports and all other records necessary to analyze the amount of backpay due under the terms of this Order.
(e) Post at the Respondent's facility at JFK Airport and at other appropriate facilities nationwide, as discussed above, copies of the attached notice marked "Appendix."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting or intranet or an internet site, and/or other electronic means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 23, 2016.

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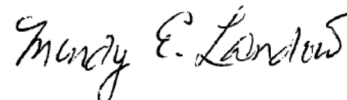
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- (f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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Dated, Washington, D.C. March 9, 2017

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Mindy E. Landow
Administrative Law Judge

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¹⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with the Service Employees International Union, Local 32BJ as the exclusive collective-bargaining representative of our employees in the following unit:

All full-time and regular part-time employees employed by us at JFK Airport excluding confidential employees, office clericals, guards and supervisors as defined by the Act.

WE WILL NOT refuse to provide information to the Union which is necessary and relevant to their function as the collective-bargaining representative of unit employees.

WE WILL NOT make changes in terms and conditions of employment without affording the Union notice and an opportunity to bargain over such changes

WE WILL NOT threaten employees with discharge because they engage in conduct in support of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

WE WILL on request, meet and bargain with the Union as collective-bargaining representative of its employees in the described appropriate bargaining unit concerning terms and conditions of employment and, if agreement is reached, embody the agreement in a signed collective-

bargaining agreement.

WE WILL provide to the Union information which is necessary and relevant to its function as collective-bargaining representative of unit employees.

WE WILL, upon request, rescind the unilateral changes made to employee terms and conditions since May 23, 2016 and make whole employees for the effects of such changes, with interest.

PRIMEFLIGHT AVIATION SERVICES, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

Two MetroTech Center (North), 100 Myrtle Avenue, Suite 5100
Brooklyn, New York 11201-3838
Hours: 9 a.m. to 5:30 p.m.
718-330-7713.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/29-CA-177992 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 718-765-6190.